IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF GOODING

AMERICAN FALLS RESERVOIR DISTRICT # 2, A & B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, MINIDOKA IRRIGATION DISTRICT, and TWIN FALLS CANAL COMPANY,

Plaintiffs,

v.

THE IDAHO DEPARTMENT OF WATER RESOURCES, an agency of the State of Idaho, and KARL J. DREHER, in his official capacity as Director of the Idaho Department of Water Resources,

Defendants.

Case No. CV-2005-0000600

ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I.

ORIENTATION

Counsel: C. Tom Arkoosh, ARKOOSH LAW OFFICES, CHTD. Gooding, ID 83330, Attorneys for American Falls Reservoir District # 2.

Roger D. Ling, LING ROBINSON & WALKER, Rupert, ID 83350, Attorneys for A & B Irrigation District and Burley Irrigation District.

W. Kent Fletcher, FLETCHER LAW OFFICE, Burley, ID 83318, Attorneys for Minidoka Irrigation District.

John A. Rosholt and John K. Simpson, BARKER ROSHOLT & SIMPSON, LLP, Twin Falls, ID 83303, Attorneys for Twin Falls Canal Company.

John K. Simpson, Travis L. Thompson, and Paul L. Arrington, BARKER ROSHOLT & SIMPSON, LLP, Boise, ID 83701, Attorneys for Intervenor Clear Springs Foods, Inc.

James C. Tucker, IDAHO POWER COMPANY, Boise, ID 83702, James S. Lochhead and Adam T. Devoe, BROWNSTEIN HEYATT & FARBER, P.C., Denver, CO 80202, Attorneys for Idaho Power Company.

Daniel V. Steenson, Charles L. Honsinger, S. Bryce Farris, and Jon C. Gould, RINGERT CLARK CHARTERED, Boise, ID 83702, Attorneys for Thousand Springs Water Users Association.

J. Justin May, MAY, SUDWEEKS, & BROWNING, LLP, Boise, ID 83707, Attorneys for Rangen, Inc.

Lawrence G. Wasden, Attorney General of Idaho and Clive J. Strong, Phillip J. Rassier, Candice M. McHugh, and Michael C. Orr, Deputy Attorneys General for the State of Idaho, Boise, ID 83720, Attorneys for the Defendants the Idaho Department of Water Resources, an agency of the State of Idaho and Karl J. Dreher, in his official capacity as Director of the Idaho Department of Water Resources.

Jeffrey C. Fereday, Michael C. Creamer, John M. Marshall, Christopher H. Meyer, and Brad V. Sneed, GIVENS PURSLEY LLP, Boise, ID 83701, Attorneys for Idaho Ground Water Appropriators, Inc.

Court: Barry Wood, District Judge, presiding.

Holdings:

1. The Rules of Conjunctive Management of Surface and Ground Water Resources (hereinafter "CMR's") are constitutionally deficient for failure to

integrate the required legal tenets and procedures regarding burdens of proof and evidentiary standards.

2. The Director acted outside his legal authority in adopting CMR's which are not in accord with Idaho's version of the prior appropriation doctrine.

3. The factors and policies contained in the CMR's and to be applied by the Director can be construed consistent with the prior appropriation doctrine.

4. The CMR's are facially unconstitutional due to the omission of necessary components of the prior appropriation doctrine, including: presumption of injury, burden of proof, objective standards for review, and failure to give due effect to the partial decree for a senior water right.

5. The CMR's exclusion of domestic water rights from ground water sources is both facially unconstitutional and is in violation of Idaho Code §§ 42-602, 42-603, and 42-607.

6. The "reasonable carryover" provision of the CMR's is unconstitutional, both facially and as threatened to be applied.

7. The CMR's disparate treatment of the holders of junior ground water rights and junior surface water does not violate Equal Protection; serves a legitimate state interest; and is rationally related to that interest.

8. Under the CMR's, the untimely administration of water rights, and in particular irrigation rights, constitutes an unconstitutional taking without just compensation.

II.

BRIEF FACTUAL BACKGROUND

This lawsuit was filed August 15, 2005, by the American Falls Reservoir District #2 and four other irrigation districts and canal company entities (hereinafter "Plaintiffs") petitioning the Court for declaratory judgment pursuant to I.C. § 67-5278 and § 10-1201 *et. seq.* regarding the validity and constitutionality of the Rules of Conjunctive Management of Surface and Ground

Water Resources (hereinafter "the CMR's") of the Idaho Department of Water Resources (hereinafter "IDWR"). The CMR's were promulgated in 1994 and appear as IDAPA 37.03.11.

Plaintiffs are holders of various natural flow and storage water rights dating from the early 1900's. These rights allow the plaintiffs to divert water from the Snake River in Idaho. By way of paragraph 10 the Complaint, the Plaintiffs allege ownership of and assert the following rights are relevant to this suit:

A. American Falls Reservoir District #2 Water Right No. 01-00006 in the amount of 1,700 cfs [cubic feet per second], with a priority date of March 20, 1921.
B. American Falls Reservoir District #2 holds a contractual right in the amount of 393,550 acre-feet of storage space in American Falls Reservoir.
C. The A&B Irrigation District Water Right No. 01-00014 in the amount of 269 cfs, with a priority date of April 1, 1939.
D. A&B Irrigation District holds contractual rights in the amounts of 46,826 acre-feet of storage space in American Falls reservoir and 90,800 acre-feet of storage space in Palisades Reservoir, for a total of 137,626 acre-feet of storage space.
E. The Burley Irrigation District holds the following surface water rights:
    (1) Water Right No. 01-00007 in the amount of 163.4 cfs, with a priority date of April 1, 1939;
    (2) Water Right No. 01-00211B in the amount of 655.88 cfs, with a priority date of March 26, 1903;
    (3) Water Right No. 01-00214B in the amount of 380 cfs, with a priority date of August 6, 1908.
F. The Burley Irrigation District holds contractual rights in the amounts of 31,892 acre-feet of storage space in Lake Walcott, 155,395 acre-feet of storage space in American Falls Reservoir, and 39,200 acre-feet of storage space in Palisades Reservoir, for a total of 226,487 acre-feet of storage space.
G. The Minidoka Irrigation District, or Reclamation on Minidoka's behalf, holds the following natural flow water rights:
    (1) Water Right No. 01-00008 in the amount of 266.6 cfs, with a priority date of April 1, 1939.
    (2) Water Right No. 01-10187 in the amount of 1,070.12 cfs with a priority date of March 26, 1926.
    (3) Water Right No. 01-10188 in the amount of 620 cfs with a priority date of August 6, 1908.

(4) Water Right No. 01-10192 in the amount of 1,550 cfs with a priority date of August 23, 1906.
(5) Water Right No. 01-10193 in the amount of 1,550 cfs with a priority date of August 23, 1906.
(6) Water Right No. 01-10194 in the amount of 550.56 cfs with a priority date of December 28, 1909.

H. The Minidoka Irrigation District holds contractual rights in the amounts of 186,030 acre-feet of storage space in Jackson Lake, 63,308 acre-feet of storage space in Lake Walcott, 82,216 acre-feet of storage space in American Falls Reservoir, and 35,000 acre-feet of storage space in Palisades Reservoir, for a total of 366,554 acre-feet of storage space.

I. The Twin Falls Canal Company holds the following surface water rights;
(1) Water Right No. 01-00004 in the amount of 600 cfs, with a priority date of December 22, 1915;
(2) Water Right No. 01-00010 in the amount of 180 cfs, with a priority date of April 1, 1939;
(3) Water Right No. 01-00209 in the amount of 3,000 cfs with a priority date of October 11, 1900.

J. The Twin Falls Canal Company holds contractual rights in the amounts of 97,183 acre-feet of storage space in Jackson Lake and 148,747 acre-feet of storage space in American Falls Reservoir, for a total of 245,930 acre-feet of storage space.

Pl.'s Compl. ¶ 10 (Aug. 15, 2005) (footnote omitted). In response to this allegation, IDWR responds:

> State Defendants admit the allegations in Paragraph 10 subparts A through J to Plaintiffs' Complaint in so far as the Plaintiffs have claims pending in the Snake River Basin Adjudication for the elements as stated and the contractual rights described but assert that the claims and contracts speak for themselves and therefore deny any allegations inconsistent with the claims or contracts. However, recommendations and determination of specific elements for each of these water rights are pending in the Snake River Basin Adjudication so no final determination of the Parties' interests thereto have been made. Regarding footnote to Paragraph 10 of Plaintiffs' Complaint, State Defendants admit the allegations therein but state that the ownership interest held by Plaintiffs in the storage water held in the reservoirs is pending before the Idaho Supreme Court in United States v. Pioneer Irr. Dist., Docket No. 31790, appeal filed April 14, 2005.

Def.'s Ans. ¶ 10 (Sept. 7, 2005).

In the non-irrigation season and during the irrigation season when spring flood runoff exceeds diversions, the surface water flows of the upper Snake River are stored in various reservoirs. Part of these flows are diverted to storage space in United States Bureau of Reclamation reservoirs to which the Plaintiffs have a right due to spaceholder contracts with the United States. This stored water is claimed to be owned and controlled by each Plaintiff for its use and for the use of its landowners or shareholders.

Depending upon the given location, the ground water in the Eastern Snake River Plain Aquifer (ESPA) is hydraulically connected in varying degrees to the Snake River and tributary surface water sources. One of the locations where a direct hydraulic connection exists is in the American Falls area. Also, according to IDAPA 37.03.11.050.01a., this hydraulic connection goes both ways -- "the Eastern Snake Plain Aquifer supplies water to and receives water from the Snake River," i.e., the aquifer feeds the river and the river feeds the aquifer.

Following a short water year in 2004, and on January 14, 2005, Plaintiffs initiated a delivery call which requested administration of junior ground water rights in Water District No. 120 to allow water to be delivered to them pursuant to their senior water rights. This delivery call was made pursuant to the CMR's, and in particular Rules 30 and 40. In response to this request, the Director claims to have applied the CMR's.

On August 15, 2005, and after having not received a satisfactory response to the requested administration, this current case was filed. The prayer in Plaintiffs' complaint seeks the following:

> WHEREFORE, plaintiffs pray for relief as follows:
>
> 1. For an Order of this Court finding that application of the Rules, as adopted, does impair, or threatens to interfere with or impair, the rights of plaintiffs.

2. For an Order of this Court declaring that the procedures and requirements of the conjunctive management rules are void on their face because they are unconstitutional, contrary to law, and violate plaintiffs' water rights and constitutional rights and defendants' duties.

3. For an Order of this Court declaring that defendants' application of the conjunctive management rules to plaintiffs' requests for delivery of water is unconstitutional, contrary to law, and violates plaintiffs' water rights and constitutional rights and defendants' duties.

4. For an Order awarding costs and attorney fees to the plaintiffs.

5. For such other and further relief as this Court deems just and equitable.

Pl.'s Compl. p. 11 (Aug. 15, 2005).

As of this writing in May of 2006, the Director has not yet entered a "final order," and Plaintiffs claim the process provided by the CMR's has not allowed for either correct or timely administration of their water rights for irrigation. This Court understands IDWR disputes that it has not administered some water pursuant to the call. See Pl.'s Compl., Ex. B, Order Regarding IGWA Replacement Water Plan; Ex. C, Order Approving IGWA's Replacement Plan for 2005; and Ex. D, Supplemental Order Amending Replacement Water Requirements (Aug. 15, 2005).

There have also been numerous parties who have intervened in this lawsuit. The Thousand Springs Water Users Association (hereinafter "TSWUA") is a non-profit corporation that represents its members in restoring water supplies in the Thousand Springs and hydraulically connected ESPA. TSWUA's members are organizations and individuals that own water rights that emanate from the northern rim of the Snake River Canyon down river from Milner Dam. Collectively, its members own over 3,900 cfs of water rights. Several of TSWUA's members have sought administration of their water rights. In these cases, the Director applied the CMR's.

Rangen, Inc. (hereinafter "Rangen") holds water rights, whose source is in the Curran Tunnel, a spring that is part of the Thousand Springs complex. One of the locations that has a

direct hydraulic connection between the ESPA and the Snake River and its tributaries is in the Thousand Springs complex. Rangen holds three water rights which are relevant to this matter: 36-1501, 36-2551, and 36-7694. On September 23, 2003 and on October 6, 2003, Rangen requested the Director to administer water rights in accordance with priority.

Idaho Power Company (hereinafter "Idaho Power") alleges that it holds various water rights including:

A. Water Right No. 36-2704 in the amount of 120 cfs, with a priority date of 01/31/1966;

B. Water Right No. 36-2082 in the amount of 5 cfs, with a priority date of 12/10/1948;

C. Water Right No. 36-2710 in the amount of 0.1 cfs, with a priority date of 07/24/1940;

D. Water Right No. 36-2037 in the amount of 0.3 cfs, with a priority date of 10/29/1921;

E. Water Right No. 36-15221 in the amount of 0.04 cfs, with a priority date of 03/03/1982;

F. Water Right No. 36-15357 in the amount of 0.11 cfs, with a priority date of 09/30/1936;

G. Water Right No. 36-15358 in the amount of 0.03 cfs, with a priority date of 06/20/1924;

H. Water Right No. 36-7104 in the amount of 0.3 cfs, with a priority date of 12/10/1969;

I. Water Right No. 36-7831 in the amount of 25 cfs, with a priority date of 11/24/1978;

J. Water Right No. 36-7066 in the amount of 10 cfs, with a priority date of 01/05/1970;

K. Water Right No. 36-2478 in the amount of 14.2 cfs, with a priority date of 10/18/2001;

L. Water Right No. 36-2478 in the amount of 3.21 cfs, with a priority date of 10/21/1939;

M. Water Right No. 36-15388 in the amount of 0.15 cfs, with a priority date of 12/10/1949; and

N. Water Right No. 36-7162 in the amount of 8.62 cfs, with a priority date of 03/04/1971.

Idaho Power Mot. to Intervene, at ¶ 2 (Oct. 7, 2005).

Clear Springs Foods, Inc. (hereinafter "Clear Springs") holds several water rights located within Water District No. 130, all of which have been decreed by the SRBA Court. On May 2, 2005, Clear Springs requested the Director to administer and deliver their water rights. The Director deemed this request to be a delivery call, and two months later issued an order, pursuant to the CMR's.

The Idaho Ground Water Appropriators, Inc. (hereinafter "IGWA") have also intervened in this action, but have done so as Defendants to this action, seeking to defend the constitutionality of the CMR's. IGWA is a non-profit corporation in Idaho that is organized to promote and represent the interests of Idaho ground water users. Its members include six ground water districts, one irrigation district, cities, industries, and municipal water providers whose members rely on ground water. Its members hold water rights authorizing diversion from wells within the ESPA. Many of these ground water rights are junior to the Plaintiffs' surface water rights discussed above.

III.

BRIEF PROCEDURAL HISTORY

On August 15, 2005, the Plaintiffs in this case filed their Complaint. On September 7, 2005, the Defendants filed their Answer. On September 7, 2005, the Defendants filed a Motion to Dismiss, and lodged a Memorandum in Support of the Motion to Dismiss. On October 11, 2005, the Plaintiffs lodged a Memorandum in Opposition to Defendant's Motion to Dismiss. On October 17, 2005, the Defendants lodged a Reply Memorandum in Support of their Motion to Dismiss. On October 18, 2005, this Court held a hearing on Defendant's Motion to Dismiss. On November 4, 2005, this Court filed an Order denying the Defendant's Motion to Dismiss.

On October 14, 2005, the Plaintiffs filed a Motion for Summary Judgment, and lodged a Memorandum in Support of their Motion for Summary Judgment. On November 1, 2005, TSWUA lodged a Memorandum in Support of Plaintiffs' Motion for Summary Judgment. On November 1, 2005, Clear Springs filed a Motion for Summary Judgment, and lodged a Memorandum in Support of their Motion for Summary Judgment. On November 2, 2005, Rangen lodged a Memorandum in Support of their own Motion for Summary Judgment, which was filed November 3, 2005.

On December 12, 2005, IDWR lodged a Memorandum in Response to Plaintiffs' Motions for Summary Judgment. On that same day, the City of Pocatello lodged a Consolidated Response to the Summary Judgment Motions, and the IGWA lodged a Memorandum in Response to Plaintiffs' Motions for Summary Judgment.

On December 16, 2005, this Court filed its Notice of Clarification of Oral Order of November 29, 2005, clarifying its position regarding facial versus as applied analysis and use of underlying facts in the case.

On December 21, 2005, Plaintiffs lodged their Consolidated Reply Memorandum in Support of Summary Judgment. That same day, TSWUA lodged its own Reply Brief in Support of Motion for Summary Judgment, and Idaho Power lodged its Consolidated Reply Brief. On December 22, 2005, Rangen lodged its Consolidated Reply to Responses to Motions for Summary Judgment.

On March 13, 2006, IGWA lodged a Sur-Reply on Summary Judgment. On March 14, 2006, the City of Pocatello lodged a Consolidated Supplemental Response to Summary Judgment, and IDWR lodged its Sur-Reply in Opposition to Motions for Summary Judgment. On March 28, 2006, the Plaintiffs lodged their Joint Final Reply in Support of Motions for Summary Judgment.

On April 11, 2006, a hearing was held on the Motions for Summary Judgment.

IV.

MATTER DEEMED FULLY SUBMITTED FOR FINAL DECISION

Oral arguments on the Plaintiffs' Motion for Summary Judgment were heard April 11, 2006. At the conclusion of the hearing no party requested additional briefing and the Court requested none. The Court therefore deemed this matter fully submitted for decision on the next business day, or April 12, 2006.

On Friday, May 19, 2006, this Court received information of an indirect potential conflict of interest in the nature of an "appearance of impropriety." As soon as the Court received this information, the Court contacted Mr. Bob Hamlin of the Idaho Judicial Council, and then wrote a letter to each of the parties advising them of the issue, and asking for direction as to how to best proceed. The Court also informed each party that the Court would not work on the case further

and that the matter will not be deemed fully submitted for decision until the resolution of this "appearance" matter.

On May 26, 2006, the Court scheduled a telephonic conference hearing for June 1, 2006. to resolve the above issues. A hearing was held on June 1. Following the hearing, the Court declined to find an appearance of impropriety which would warrant a disqualification or recusal. This Court then advised the parties that the Court would again consider the matter fully submitted for decision. The Court therefore deemed this matter fully submitted for decision on the next business day, or June 2, 2006.

V.

THIS COURT'S JURISDICTION IS PROPER

1. Declaratory Judgment Action.

This Court has jurisdiction to presently hear this case. Idaho Code § 67-5278 provides:

> **Declaratory judgment on validity or applicability of rules –**
>
> (1) The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, **if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner.**[1]
>
> (2) The agency shall be made a party to the action.
>
> (3) **A declaratory judgment may be rendered whether or not the petitioner has requested the agency to pass upon the validity or applicability of the rule in question.**

Idaho Code § 67-5278 (WEST 2006) (emphasis mine).

[1] While the administrative action remains incomplete, the "threatened application" is well established by the various orders issued by the Director in response to Plaintiffs' call of January 14, 2005. See Pl.'s Compl. Ex. B, C, and D.

2. Idaho Code §§ 10-1201, *et. seq.*

These code sections also grant this Court jurisdiction to hear the issues presented.

3. Exhaustion of Administrative Remedies.

The Idaho Supreme Court recently stated in Regan v. Kootenai County, 140 Idaho 721, 100 P.3d 615 (Idaho 2004):

> In Idaho, as a general rule, a party must exhaust administrative remedies before resorting to the courts to challenge the validity of administrative acts. This Court has recognized exceptions to that rule in two instances: (a) when the interests of justice so require; and (b) when the agency has acted outside its authority...

Regan, 140 Idaho at 725 (internal citations omitted).

As to the first exception, the Plaintiffs submitted their delivery call to the Director in January of 2005, well before the 2005 irrigation season. It is now May of 2006, the start of the second irrigation season since the delivery call was made, and the administrative action as to Plaintiffs' water rights is incomplete.[2] According to the Director, the irrigation season is November 1 of a given year through October 31 of the next.

As to the second exception, whether the agency acted outside its authority, this Court finds that it has. In particular, the legislature authorized the Director to adopt Rules in accordance with the prior appropriation doctrine. Idaho Code § 42-603 (WEST 2006). To the extent the CMR's do not follow Idaho's version of the prior appropriation doctrine, the Director has acted outside his authority and the CMR's are invalid. This is a basis independent of any

[2] The Court has been led to believe that the parties have recently agreed by stipulation to delay the administrative resolution of Plaintiffs' water rights, pending this Court's decision in this matter. However, this stipulation was not entered into or agreed to until the Spring of 2006, well after a year had gone by without the administration being completed. The Court is unaware of the specifics of this agreement.

constitutional challenge, facial or as applied. This will be discussed in far greater detail later in this decision.

4. Facial Challenge.

This Court re-iterates portions of its ruling of November 4, 2005, on IDWR's Motion to Dismiss. This Court stated:

> 13. With respect to facial challenges, IDWR concedes that this Court presently has subject matter jurisdiction but in the exercise of discretion, this Court should defer a determination on that matter until IDWR has completed the ongoing contested case.
>
> 14. The senior surface entities assert that in response to their January 2005 delivery call, the Director adopted a novel, but unconstitutional, theory of water administration: namely a *de facto* re-adjudication of certain elements of the water rights to include the use of an injury analysis and a public interest component of economic optimization -- coupled with -- methods of conventional water delivery administration. The senior surface entities have dubbed this process 'Economic Administrative Adjudication' under/pursuant to the CM Rules.[3]
>
> 15. Simply stated, the surface entities assert that certain of the CM Rules are unconstitutional on their face.
>
> ***
>
> As to the facial Constitutional challenges, IDWR recognizes and concedes this Court has jurisdiction, rather it is urged that this Court exercise its discretion and defer a determination under the doctrine of primary jurisdiction.
>
> ***
>
> With respect to the 'facial Constitutional challenges' the doctrine of Primary Jurisdiction simply is not applicable to this case. It is freely admitted that IDWR does not have jurisdiction over these questions and will never decide these questions.

[3] Of course, at the time this Court wrote this in November of 2005, the Director had scheduled a trial for March 6, 2006. As of this writing, the trial has not occurred.

> To the contrary, and in the exercise of discretion, this Court finds little reason to delay an inevitable Constitutional challenge to the Conjunctive Management Rules. The logic and rationale for delay, under the circumstances presented, make little sense to this Court for several reasons. One, this is not the only case pending before this Court where the CM Rules are implicated and their application contested. Now that the constitutionality of the rules has been raised, it makes judicial sense to resolve the issue forthwith. Second, given the time sensitive nature pertaining to administration of water rights, it makes little sense to further delay resolution of the issue.

Order on IDWR's Mot. Dis., at 5-8 (Nov. 4, 2005) (original footnotes omitted, footnote added).

5. As Applied Challenge

In its initial ruling of November 4, 2005, this Court stated in part:

> 12. With respect to as applied challenges, IDWR's position is that IDWR has not completed the contested case proceedings and as such, there has been a failure to exhaust the administrative remedies which IDWR argues is a subject matter jurisdiction requirement for this Court to proceed.
>
> ***
>
> As to the 'as applied challenge,' and the assertion that this Court lacks subject matter jurisdiction based upon the general rules of Exhaustion of Administrative Remedies, it is a correct factual statement that the plaintiffs have not yet exhausted those remedies.
>
> The Idaho Supreme court in Regan v. Kootenai County, 140 Idaho (2004) [sic] recognizes two exceptions to the general exhaustion requirement. Those are: (1) when the interests of justice so and, (2) when the agency acted outside its authority. [Sic].
>
> As to the 'as applied' question, the Court decides the Motion to Dismiss presently before it without resort to and in fact declines to rule upon the exhaustion question. The parties are free to take whatever actions they deem necessary in the pending administrative proceeding. It simply is not necessary to a resolution of the primary issue before this Court. As such, the Court simply declines to decide this issue.

Order on IDWR's Mot Dis. at 5-6 (Nov. 4, 2005).

This Court then issued a Notice of Clarification to clarify its intent on what would be heard on the "as applied" matter. This Court incorporates that Order herein by reference. This Order specifically provided that this Court would consider the Director's threatened application of the CMR's. See Notice of Order of Clarification of Oral Order of November 29, 2005, (Dec. 16, 2005).

Suffice it to say, this Court has jurisdiction to hear the issues raised by the Plaintiffs' Complaint.

VI.

OVERVIEW OF THE CHALLENGED RULES

A true and complete copy of the CMR's is attached to this Order as Exhibit 1, and are, by this reference, incorporated herein. According to Plaintiffs' Memorandum lodged in support of Summary Judgment on October 14, 2005, there are various CMR's that are being challenged in this lawsuit. The specifically enumerated CMR's which are listed in the Plaintiff's brief are:

Rule 10.07: Full Economic Development of Underground Water Resources.

Rule 10.14: Material Injury.

Rule 10.15: Mitigation Plan.

Rule 20.01: Distribution of Water Among the Holders of Senior and Junior-Priority Rights.

Rule 20.03: Reasonable Use of Surface and Ground Water.

Rule 20.04: Delivery Calls.

Rule 20.05: Exercise of Water Rights.

Rule 20.07: Sequence of Actions for Responding to Delivery Calls.

Rule 20.11: Domestic and Stock Watering Ground Water Rights Exempt.

Rule 30: Procedure Responding to Calls Outside Water Districts

Rule 40: Procedure Responding to Calls Inside Water Districts

Rule 41: Procedure Responding to Calls Inside Ground Water Management Area

Rule 42: Material Injury/Reasonableness of Water Diversions

Rule 43: Mitigation Plans

Pl.'s Memo. in Support of S.J. 2 (Oct. 14, 2005).

VII.

ISSUES AS STATED BY THE PLAINTIFFS

For the sake of clarity, the Plaintiffs' briefing essentially states and organizes the issues in this fashion:

Issue #1: Whether the Department's Conjunctive Management Rules violate Idaho's Constitution and Water Distribution Statutes.

A. **Does administration pursuant to Department's Rules only occur when a senior water right holder files a "delivery call" and the Director determines the senior is suffering "material injury" by reason of junior water right(s)?**

B. **Do the Rules misapply other constitutional provisions and unrelated statutes to limit senior water rights and prevent priority administration?**

1. Does Idaho Constitution, Article XV, § 5 only apply within an irrigation entity's project, and not between different water right holders?
2. Does Article XV, § 7 limit or condition senior water rights?
3. Do the Rules attempt to incorporate aspects of Idaho's Ground Water Act to limit senior water rights contrary to Idaho's Constitution, Statutes, and prior case law?
4. Do the Rules misapply Schodde v. Twin Falls Land & Water Co. in an effort to limit senior water rights?

C. Do the Rules impermissibly exempt categories of junior ground water rights from administration?

D. Do the Rules allow the Director to force seniors to accept "mitigation" in lieu of required administration of junior ground water rights?

Issue # 2: Whether the definition and overall concept of "material injury" violates Idaho's Constitution and Statutory provisions.

Issue #3: Whether the Rules' concept of "reasonable carryover" injures vested senior storage water rights and violates Idaho's Constitution and water distribution statutes.

Issue # 4: Whether the Rules permit the Director to ignore the elements of decreed and licensed water rights and "re-adjudicate" those rights for purposes of administration.

Issue # 5: Whether the Rules discriminate against junior surface water users in favor of junior ground water users.

Issue # 6: Whether the replacement water plan constitutes unlawful rulemaking in violation of Idaho's APA.

VIII.

APPLICABLE STANDARDS OF REVIEW

1. Summary Judgment

Summary judgment is proper if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Read v. Harvey, 141 Idaho 497, 499, 112 P.3d 785, 787 (Idaho 2005); citing Idaho R. Civ. P. 56(c). However, when an action is to be tried before the court without a jury, as in this case, "the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from *uncontroverted* evidentiary fact." Read, 141 Idaho at 499 (emphasis in original); citing Loomis v. City of Hailey, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (Idaho 1991). Any disputed facts must be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. Read, 141 Idaho at 499.

Generally, a motion for summary judgment requires a court to hold that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Barlow's Inc. v. Bannock Cleaning Corp., 103 Idaho 310, 647 P.2d 766, (Idaho App. 1982).

> However, if the court determines, after a hearing, that no genuine issues of material fact exist, the court may enter judgment for the parties it deems entitled to prevail as a matter of law. Thus, in appropriate circumstances, the court is authorized to enter summary judgment in favor of non-moving parties.

Barlow's Inc., 103 Idaho at 312. If the evidence shows no issue of material fact, what remains is a pure question of law. Spur Products Corp. v. Stoel Rives L.L.P., 142 Idaho 41, 122 P.3d 300, 303 (Idaho 2005).

Summary judgment should be granted if the non-moving party fails to make a showing sufficient to establish an essential element to the party's case. Foster v. Traul, 141 Idaho 890, 892, 120 P.3d 278, 280 (Idaho 2005); citing McColm-Traska v. Baker, 139 Idaho 948, 950-51, 88 P.3d 767, 769-70 (Idaho 2004).

2. Constitutionality of Agency Rules – Facial v. As Applied Challenges

Both parties have made much of the legal standards surrounding this Court's ability to interpret the constitutionality of the CMR's. The Plaintiffs argue that an "as applied" standard is the proper standard in this case, and the Court should consider all the facts leading up to this suit, including past decrees and orders issued by the Director and IDWR. The Plaintiffs further argue that a water right is a fundamental right, and as such, any regulation which seeks to limit the right, is subject to the standard of review of "strict scrutiny."

Conversely, the Defendants argue that all factual evidence must be excluded from this decision, and the Court should only look to the face of the CMR's, the Constitution and the statutes. The Defendants further argue that this is a strict facial challenge to the CMR's, and as such, if they can point to any set of circumstances where the CMR's could be construed as constitutional, this Court must deny the Plaintiffs' request to declare the CMR's unconstitutional. In support of this argument, the Defendants cite to numerous Idaho cases which state that a constitutional challenge to a statute or a rule must be determined on either a facial or as applied basis, but cannot be based on a hybrid between the two. See State v. Korsen, 138 Idaho 706, 712, 69 P.3d 126, 132 (Idaho 2003). Finally, the Defendants argue that a water right is not a fundamental right, and therefore, the strict scrutiny standard would not apply. The Court will take each of these arguments in turn.

Courts have the responsibility to construe legislative language in order to determine the law. Mason v. Donnelly Club, 135 Idaho 581, 583, 21 P.3d 903, 905 (Idaho 2001). This responsibility extends to review of administrative rules, and it is the court's responsibility to determine the validity of a rule. Id.

Challenged regulations are presumptively constitutional, and the heavy burden of establishing their unconstitutionality rests upon the party challenging the regulation. Matter of Wilson, 128 Idaho 161, 167, 911 P.2d 754, 760 (Idaho 1996); citing Rhodes v. Industrial Comm., 125 Idaho 139, 142, 868 P.2d 467, 470 (Idaho 1993).

A statute or regulation may be challenged as being unconstitutional on its face or as applied to the challengers. Korsen, 138 Idaho at 712. A facial challenge requires the challenger

to establish that no set of circumstances exist under which the rule would be valid.[4] Moon v. North Idaho Farmers Ass'n, 140 Idaho 536, 545, 96 P.3d 637, 646 (Idaho 2004); citing United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697, 707 (1987). However, to succeed on an "as applied" challenge, the complainant must show that the rule, as applied to the specific complainant, fails to meet constitutional scrutiny (in other words, that it is unconstitutional in this instance, but not necessarily in all instances). Korsen, 138 Idaho at 712. Generally, a facial challenge is mutually exclusive from an as applied challenge. Id.

In Korsen, the Idaho Supreme Court held that it was improper for the district court to conclude that a statute was invalid on its face, *only* as it applied to public property, because a facial challenge requires the statute to be impermissible in *all* of its applications. Id. However, I.C. § 67-5258 provides a standard of "application or threatened application" when determining if a declaratory judgment is an available remedy.

> The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner.

I.C. § 67-5258. This statute clearly contemplates the use of a factual history of a case when determining a rule's validity. In this case, this would include the Director's Orders entered in the Spring of 2005 pursuant to the Plaintiffs' delivery call. See Pl.'s Compl. Ex. B, C, and D.

In Moon, the Idaho Supreme Court applied the test for facial constitutionality, because there were no facts presented, and therefore, an "as applied" challenge was not available to the plaintiffs. Moon, 140 Idaho at 545. However, the Court did state that "Plaintiffs challenging the constitutionality of a statute are required to provide 'some factual foundation of record' that

[4] The Plaintiffs assert that this standard only applies to "void for vagueness" challenges. While it is true that the vast majority of decisions that have cited this test were void for vagueness challenges, Moon and others were not such challenges. Therefore, this argument warrants little discussion.

contravenes the legislative findings." Id.; citing O'Gorman & Young v. Hartford Fire Ins. Co., 282 U.S. 251, 258, 51 S.Ct. 130, 132, 75 L.Ed.324, 328 (1931).

While this Court recognizes that generally parties must choose to attack a rule's constitutionality either as a facial challenge, or as an "as applied" challenge, this case simply is not conducive to such a rigid application. In one respect of this case, the Plaintiffs have technically exhausted all possible administrative remedies available, because the Director has stated he has no intention of ruling on the constitutionality of the CMR's, nor does he have the jurisdiction to do so. Therefore, the remedy sought by the Plaintiffs cannot be achieved through administrative avenues. However, the administrative proceedings have not been fully completed – specifically, the trial scheduled for March of 2006 was continued and the Director has not finally determined if the Plaintiffs are entitled to administration of their water rights, and if so, to what degree or extent. Therefore, a strict "as applied" analysis is not technically proper. However, the procedures that are being challenged have been used against the Plaintiffs, so, unlike in Moon, there is a factual basis to determine how the Director employs the CMR's, and how they operate, and therefore being restricted to a strict "facial" analysis is also not proper. There are, however, certain aspects of this case which do fit neatly into a facial challenge analysis and those will be decided on that basis.

In light of the confusion surrounding this case, its unique circumstances, and the aforementioned case law, this Court issued a Notice of Clarification of Oral Order of November 29, 2005, filed December 16, 2005.

> 2. Suffice it to say, with brevity, this Court ruled it would hear the Plaintiff's constitutional 'facial challenges' to the Conjunctive Management Rules.
>
> As to the 'applied challenges' this Court ruled that the Administrative proceeding instituted January 14, 2005, has not yet been concluded; that

there were two recognized exceptions to the general exhaustion requirement; and the Court at that time declined to rule on the exhaustion question or either of the stated exceptions to the exhaustion requirement. The parties are free to pursue the pending administration as they see fit.

***

2. As stated in its November 4, 2005, written decision, this Court declining to presently address the 'as applied' challenge is primarily premised on the fact that the ultimate resolution of that contested case has not yet occurred. In fact, the written decision noted that the hearing (trial) was now scheduled for March 6, 2006. Since the ultimate result is unknown, this 'as applied' challenge is not presently subject to review.

***

3. However, even though the ultimate result of the Administrative proceeding is presently unknown, what has occurred to date within the Administrative proceedings are not in the hypothetical, rather are factual, and are subject to being placed in the record before this Court. See I.C. 67-5278(1).

***

6. So as to try to avoid any further confusion, the 'as applied' matter means the ultimate future result following the March 6, 2006 hearing, i.e., the end result of the pending Administrative proceeding.

7. The 'as applied' ruling does not mean that a party in the present proceedings is precluded from referring to the actual procedural history of the contested administrative case to date or other records and files and orders of IDWR (in this case or any other) to try to demonstrate why a particular rule or part of a rule is Constitutionally flawed.

8. As such, other rules, orders, proceedings, cases, et cetera, within/involving IDWR may be applicable as well. The Court declines IDWR's request in its *Memorandum* lodged December 6, 2005 to strike entire affidavits, etc. If IDWR or anyone else has a particularized objection to some item, such a motion can be made.

9. A good deal of Plaintiffs' facial constitutional challenges are premised upon procedures employed, or to be employed, by the Director and the Department via the Conjunctive Management Rules. There is no better evidence of such procedures than the actual conduct of IDWR and the Director to date, i.e., an analysis based upon fact versus hypothetical is usually better in making a constitutional evaluation.

Notice of Clarification of Oral Order of Nov. 29, 2005, 2-4 (Dec. 16, 2005).

Ultimately, the Court's resolution to the discussion of whether a facial analysis is to be used or whether an "as applied" analysis is to be used is as stated in the December 16, 2005, Order, quoted above. Consistent with that Order, this Court will apply both. This Court looks at the CMR's and determines whether the actions taken by the Director and the IDWR, pursuant to the CMR's is unconstitutional in every application, but this Court will also utilize the underlying facts in this case to determine whether the CMR's are invalid, and to illustrate how the CMR's were actually being applied.[5] Of course, the final result of the administrative proceeding is not known and therefore cannot be addressed.

The Plaintiffs have also alleged that because a water right is a fundamental right, strict scrutiny should be applied to this case. In support of this proposition, Plaintiff's cite to Bradbury v. Idaho Judicial Council, 136 Idaho 63, 28 P.3d 1006 (Idaho 2001), which states:

> [I]t is a general rule that 'a legislative act should be held to be constitutional until it is shown beyond a reasonable doubt that it is not so, and that a law should not be held to be void for repugnancy to the Constitution in a doubtful case.' However, the general presumption is not always applicable.

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[5] In the analysis section of this Order, this Court will discuss whether the CMR's operate as an unconstitutional taking. However, as an example as to how this facial versus as applied analysis will apply, the following law is relevant:

> In the context of a takings claim, a facial challenge involves a claim that the mere enactment of a statute constitutes a taking and is to be distinguished from an 'as applied' challenge, which involves a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation. Plaintiffs pursuing a facial challenge must show that the provision is unconstitutional in all its applications, while plaintiffs pursuing an as-applied challenge must show that the provision was applied to them in such a way that deprived them of their property. In the context of facial challenges, the mere enactment of legislation may be sufficient to constitute a taking claim.

26 Am.Jur.2d Eminent Domain, § 11. In this case, the Plaintiffs argue that the CMR's allow the Director to re-adjudicate the previously decreed water rights. If this Court determines that the CMR's do allow such a re-adjudication, this would be constitutionally deficient in any application, regardless of the facts of this case. See State v. Nelson, 131 Idaho 12, 951 P.2d 943 (Idaho 1998). In order to help determine whether the CMR's attempt to give the Director this authority, this Court will look at the facts of this case to determine if the Director did or threaten to do this.

> It has been held in some jurisdictions that when it is proposed by a statute to deny, modify, or diminish a right or immunity secured to the people by a clear and explicit constitutional provision, the presumption in favor of the constitutionality of statutes no longer applies, but a contrary presumption arises against the validity of such statute. Similarly, it has been said that the presumption of constitutionality is inapplicable in civil rights cases involving fundamental constitutional rights.

When a statute infringes on a fundamental right or a suspect class, the presumption is that the statute is invalid unless the state can demonstrate the statute is necessary to serve a compelling state interest.

***

Where no fundamental right or suspect classification is involved or **when dealing with legislation involving** social or **economic interests**, courts apply the rational basis test's deferential standard of review. In this context, this Court has stated that:

> 'Substantive due process' means 'that state action which deprives [a person] of life, liberty, **or property** must have a rational basis -- that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.'

***

When a state law is challenged on constitutional grounds it is necessary to determine the nature of the right claimed to be infringed. If it is a fundamental right, strict scrutiny applies -- that is, the presumption in favor of constitutionality is not applicable. The state must show a compelling interest to vindicate the law. If, however, the law does not infringe a fundamental constitutional right, the rational basis test is applicable -- the presumption is then in favor of the state.

Bradbury, 136 Idaho at 68-69 (internal citations omitted) (brackets in original, emphasis mine).

The Idaho Supreme Court went on to discuss what constitutes a suspect classification or a fundamental right. A suspect classification is created in the following circumstances: racial

classifications; national origin classifications; alienage classifications; legitimacy classifications; and gender classifications. Id. at 68.

> In the absence of indivious [sic] discrimination, however, a court is not free... to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures... The threshold question, therefore, is whether the ... statute is invidiously discriminatory. If it is not, it is entitled to a presumption of validity...

Id.; quoting Parham v. Hughes, 441 U.S. 347, 351-52, 99 S.Ct. 1742, 1745-46, 60 L.Ed.2d 269, 274-75 (1979). A classification based on property rights is not a suspect classification. The Idaho Supreme Court also listed various rights which the Idaho Supreme Court has recognized as being fundamental rights. These rights include: the right to travel interstate; the freedom of association; the right to participate in the electoral process; the right to privacy; and access to courts. Bradbury, 136 Idaho at 69, n. 2. Property rights are not included in this list. Further, the Court states that legislation implicating economic interests, as a water right surely is, is not subject to strict scrutiny. Therefore, but with some reservation, this Court determines that a water right is not a fundamental right,[6] therefore strict scrutiny would not apply in this case, and the usual presumption in favor of the constitutionality of regulations will be applied.

3. Agency Rules Which Exceed statutory Authority

The legal basis for this review is independent and in addition to the constitutional challenge.

The CMR's are agency rules and generally, a party challenging the validity of an agency rule must first exhaust all administrative remedies before filing a complaint in district court. See Asarco, Inc. v. State of Idaho, 138 Idaho 719, 722, 69 P.3d 139, 142 (Idaho 2003). However,

[6] Even though a water right is a "property right," whether a water right is a "fundamental right" is not so easily answered and is fairly debatable, the reason being water that water rights occupy their own Article in the Idaho Constitution.

under the circumstances presented here, it is unnecessary for the Plaintiffs to exhaust all their administrative remedies prior to seeking a declaratory judgment in district court.

As discussed earlier, there are several reasons for this. The first is that the Director does not decide the constitutionality of his own rules. [7]

Secondly, there is an exception for declaratory judgments regarding the validity of agency rules. Id. Idaho Code § 67-5278 states:

> The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court, if it is alleged that the rule, or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights of the petitioner.
>
> ***
>
> A declaratory judgment may be rendered whether or not the petitioner has requested the agency to pass on the validity or applicability of the rule in question.

I.C. § 67-5278.

The third is that although an agency action will generally have the force and effect of law, in order for the agency action to have the effect and force of law, it must be promulgated according to statutory directives for rulemaking. Asarco, 138 Idaho at 723.

If there is a conflict between a statute and a regulation or rule, the regulation must be set aside to the extent of the conflict. Roeder Holdings, L.L.C. v. Board of Equalization of Ada County, 136 Idaho 809, 813, 41 P.3d 237, 241 (Idaho 2002). A regulation or rule of an administrative agency will generally be upheld if it is reasonably directed to the accomplishment of the purposes of the statutes under which it is established. Id. A rule or regulation that is not

[7] Even if the Plaintiffs were required to exhaust all their administrative remedies before seeking such a declaratory judgment, the remedy they are seeking, to-wit: a declaration as to the constitutionality of the CMR's, is not available to them through administrative action. This is because the Director has conceded that he has no intention of ever resolving the question of the CMR's constitutionality. Therefore, there is no administrative remedy available that would meet this remedy sought by the Plaintiffs.

within the expression of the statute is in excess of the authority of the agency to promulgate that regulation and must fail. Id.

> In the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the legislature or exercise its sublegislative powers to modify, alter, enlarge or diminish provisions of a legislative act that is being administered.
>
> The final responsibility for interpretation of the law rests with the courts. **A court must always make an independent determination whether the agency regulation is 'within the scope of the authority conferred,'** and that determination includes an inquiry into the extent to which the legislature intended to delegate discretion to the agency to construe or elaborate on the authorizing statute.

Id.; citing Yamaha Corp. of America v. State Board of Equalization, 19 Cal.4th 1, 78 Cal. Rptr.2d 1, 960 P.2d 1031, 1041 (Cal. 1998) (internal citations omitted) (emphasis mine). See also Holly Care Center v. State of Idaho, 110 Idaho 76, 78, 714 P.2d 45, 47 (Idaho 1986) ("[A]dministrative rules are invalid which do not carry into effect the legislature's intent as revealed by existing statutory law, and which are not reasonably related to the purposes of the enabling legislation."); Idaho County Nursing Home v. Idaho Department of Health and Welfare, 120 Idaho 933, 937, 821 P.2d 988 (Idaho 1991).

IX.

CONSTITUTIONAL FRAMEWORK

I. The Framers understood the importance of putting something in the Constitution.

First, it is worth noting that at the time of the Constitutional Convention in Boise, the area was experiencing a drought. Proceedings and Debates of the Constitutional Convention of Idaho 1889 1122-23, 1349 (I.W. Hart ed., Caxton Printers, Ltd. 1912) (hereinafter Proceedings and Debates) (Mr. Coston's remarks).

Second, at the time of the Convention, part of the waters diverted from the Boise River into a large irrigation canal were then used for "manufacturing purposes, in generating electricity, to light this town." Id. at 1125.

Third, various members of the Convention clearly understood the significance of something being placed in the Constitution. This is in part illustrated by the following remarks:

> Mr. BEATTY. Mr. Chairman, **one of my chief objections to incorporating this as a part of the fundamental law is that we do not know just what we want.** I do know that this is a very important question. **I know that the question of appropriation of water is yet in its infancy in Idaho**, and I, for one, scarcely know what we want. **But we are undertaking in the doctrines here incorporated to establish as it were something that will result in a great deal of damage.**

Id. at 1138 (emphasis mine).

> Mr. AINSLIE. But **this is an article of the organic law.**

Id. at 1146 (emphasis mine).

> Mr. AINSLIE. **That would secure all their constitutional rights**; and I move the adoption of it.

Id. at 1161 (emphasis mine).

> Mr. GRAY. **I will ask the gentleman if that is not the law anywhere as it stands?**
>
> Mr. HEYBURN. **It will be the law unless we enact something to change it; it is the law now and I want it to remain the law in the organic law of this territory.**
>
> Mr. GRAY. **Why put it in here then?**
>
> Mr. HEYBURN. The fact that it is the law now does not promise it will be the law after this constitutional convention gets through with its work. **If we say without any qualification that prior appropriation or diversion of water, etc., I presume we will mean just that thing, and we don't want to leave that a thing of construction for the courts. The object of our action here is to establish these fundamental principles of law, and in this bill already we say that prior appropriation shall give a prior right**, and that has been the battle cry of the gentleman from

Ada throughout the consideration of this section. I simply want this convention to say that the location of a mining claim or of a piece of property, which from the very nature of it contemplates the use of this water, shall be a prior appropriation. That is the object of the section.

Mr. GRAY. **I don't see how we are defending the law.**

Mr. HEYBURN. **It is a declaration of a right.**

Mr. GRAY. **As I said before, we will have this constitution bigger than the Bible before we get through.** It is just and clear, and a principle that has been decided before you and I were born, I expect – not before I was, but before you were – that a man cannot take and hold water without he does it for a useful purpose. He cannot hold it just because he has taken it; that does not give him a right; it does not give the factory a right, and if he is not using it, it must go below to the neighbor. It is not a *property*, it is only a *use*, that we have in this water, and **I do not think we are lumbering up what we call a constitution with all these proceedings over a matter connected with it which should be for the statutes if we desire it at all.**

Id. at 1167-68 (italicized emphasis original, bold emphasis mine).

And lastly,

Mr. HEYBURN. **I am willing to leave it to the legislature if we do not lock the door against the legislature, because I am satisfied that the legislature would deal with this matter better than this convention could. Its powers are of a rather different character, more in detail. But I do not want to see the door shut, and my object in introducing this section was that the convention's attention should be called to that effect, and the door not entirely shut against the legislature providing for those matters.** I am just as well aware of the possibility of working an injustice in this section, perhaps, as the gentlemen who have so plainly and specifically stated such possibilities. A man might do a great many unjust things if he is clothed with this right, and if the right is absolutely taken away from him he might be deprived of a great many very plain and just rights...

Id. at 1171 (emphasis mine).

Fourth, certainty of interests was on the minds of the members. Examples are:

[Mr. BEATTY]...

> But the main objection is this; it makes all interests uncertain. I put the question to any of you, who of you would invest your money in establishing any large manufacturing establishment when you know that the water that you desire to use in running that establishment **may at any time be taken away from you by either of these two other interests, that is, the agriculturalists, or for domestic use**? For that is what this section means, if it means anything, or else I do not properly construe it...

Proceedings and Debates at 1118 (emphasis mine).

> Mr. McCONNELL. Well, I am opposed to this amendment then, because it strikes out what we have been working to secure. **We have been working to secure a permanent investment to those people who have seen fit to go out on the plains and improve farms. If they have no priority of right after they have gone there and done that work over a manufacturing interest, then there is no security in their going there.** That is the way I would understand it...

Id. at 1332 (emphasis mine).

II. Idaho Constitution: Article XV, § 3.

A principal constitutional provision at issue in the present case is Article XV, § 3. As originally adopted at the time of statehood in 1890, this section provided as follows:

> ARTICLE XV
>
> WATER RIGHTS
>
> SEC. 3: The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same,, those using the water for domestic purposes shall, (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose. And those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district, those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of

> law regulating the taking of private property for public and private use, as referred to in Section 14 of Article I of this constitution.

Id. at 2079-80.

Article XV, § 3 has been amended once, which was in 1927, as proposed by S.L. 1927, p. 591, H.J.R. No. 13, which resolution provided in pertinent part:

> Be It Resolved by the Legislature of the State of Idaho:
>
> Section 1. That the first sentence of Section 3 of Article XV of the Constitution of the State of Idaho be amended to read as follows:
>
> 'Article XV, Section 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, *except that the State may regulate and limit the use thereof for power purposes*.'
>
> Sec. 2. The question to be submitted to the electors of the State of Idaho at the next general election in order to determine whether they approve or reject the amendment proposed in Section 1, shall be as follows:
>
> 'Shall Section 3 of Article XV of the State Constitution be so amended as to provide that the State may regulate and limit the use of the unappropriated waters of any natural stream for power purposes?'

1927 Idaho Laws 591-92 (emphasis in original).

The proposed amendment was ratified at the general election in November, 1928, and Article XV, § 3 was so amended to allow the State to regulate and limit the use of the unappropriated waters of any natural stream for power purposes.

III. Principles of Constitutional Interpretation

One issue to address for purposes of examining the prior appropriation doctrine is the proper method of interpreting the Idaho Constitution.

What is the Idaho Constitution? The first step in this analysis is to address the question of "what is the Idaho Constitution?" The Idaho Supreme Court has previously answered that inquiry. In Blackwell Lumber Co. v. Empire Mill Co., 28 Idaho 556, 155 P. 680 (Idaho 1916), the Idaho Supreme Court stated:

> What is the Constitution of Idaho, anyway? It is the supreme law of the state formed by the mighty hand of the people themselves, in which certain fixed principles of fundamental law are established. It contains the will of the people, and is the supreme law of the state.

Blackwell Lumber Co., 28 Idaho at 580. The Constitution is the supreme law of the state.[8]

The meaning of the Idaho Constitution does not change over time. A recognition that the Idaho Constitution establishes "certain fixed principles of fundamental law" and is "the supreme law of the state" has a necessary implication. For the Constitution to establish *fixed* principles and for it to be the *supreme law* of the state, its meaning cannot change over time. If courts [or an administrative agency] can re-interpret it to mean something other than originally intended, then its principles are no longer fixed and it is no longer the supreme law of this state. Rather, the courts would become the supreme law of this state. The Idaho Supreme Court acknowledged this principle in Girard v. Diefendorf, 54 Idaho 467, 34 P.2d 48 (Idaho 1934):

> A constitution is not to be made to mean one thing at one time and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. ... The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

Girard, 54 Idaho at 474-75 (internal citations omitted).

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[8] This statement is obviously subject to the provisos of Article I, § 3, that the "Constitution of the United States is the supreme law of the land" and in Article 6, § 2 of the United States Constitution that it, federal laws, and treaties are the supreme law of the land. This case, however, does not concern any conflict between federal law or treaties and state law.

Construing the Idaho Constitution contrary to its meaning when adopted would be usurping the authority of the people. The Idaho Constitution provides, "All political power is inherent in the people." Idaho Const. Art. I, § 2. The people of Idaho adopted the Constitution, and it "can be revoked, nullified, or altered only by the authority that made it." Blackwell Lumber Co., 28 Idaho at 580. The people have reserved unto themselves the sole power to amend the Constitution. Idaho Const. Art. XX §§ 1-4. "The court has no more power to amend the Constitution than has the Legislature, and *vice versa*." Straughan v. City of Coeur d'Alene, 53 Idaho 494, 501, 24 P.2d 321, 323 (Idaho 1932) (emphasis in original). A court that "giv[es] to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty..." Girard, 54 Idaho at 474. "If [the Constitution] is to be amended, the amendment should come from the people in the constitutional manner and not by way of judicial construction." Feil v. City of Coeur d'Alene, 23 Idaho 32, 58, 129 P. 643, 652 (Idaho 1912).

Based upon the forgoing the Idaho Constitution must be construed according to the intent of the framers. "In construing the constitution, the primary object is to determine the intent of the framers." Williams v. State Legislature, 111 Idaho 156, 158-59, 722 P.2d 465, 467-68 (Idaho 1986). That principle of construction simply flows from the fact that the Constitution had a fixed meaning when it was drafted by the delegates to the constitutional convention and then adopted by the people. The delegates did not simply choose nice-sounding words and phrases that had no meaning to them. It is obvious from reading the proceedings of their debates that they took their task seriously. The intentions of many of the delegates were expressly stated. In the end, they understood the meaning of the provisions that they drafted, debated, amended,

and ultimately approved. When construing the Constitution, therefore, a court's task is simply to determine what the delegates understood the constitutional provision at issue to mean; i.e. determine the intent of the framers.

The Idaho Supreme Court is the final authority in construing the Idaho Constitution.

IV. Idaho Code § 42-602 and 603 as it relates to the Constitutional interpretation of Article XV, § 3.

Idaho Code § 42-602 reads:

> The director of the department of water resources shall have direction and control of the distribution of water from all natural water sources within a water district to the canals, ditches, pumps, and other facilities diverting therefrom. Distribution of water within water districts created pursuant to section 42-604, Idaho Code, shall be accomplished by watermasters as provided in this chapter and supervised by the director.
>
> **The director of the department of water resources shall distribute water in water districts in accordance with the prior appropriation doctrine.** The provisions of chapter 6, title 42, Idaho Code, shall apply only to distribution of water within a water district.

Idaho Code § 42-602 (WEST 2006) (emphasis mine).

Idaho Code § 42-603 reads:

> **The director** of the department of water resources **is authorized to adopt rules and regulations for the distribution of water** from the streams, rivers, lakes, ground water and other natural water sources **as shall be necessary to carry out the laws in accordance with the priorities of the rights of the users thereof.** Promulgation of rules and regulations shall be in accordance with the procedures of chapter 52, title 67, Idaho Code.

Idaho Code § 42-603 (WEST 2006) (emphasis mine).

Because this Court is charged with determining the intent of the framers, and because the Director is only authorized to adopt rules for administration which are in accordance with the prior appropriation doctrine, an examination of the adoption of Idaho's version of that doctrine is

necessary. More particularly, a tracing of the events actually serves two (2) primary purposes: the tracing reveals what ended up in the Constitution, and why; the tracing also reveals what did not end up in the Constitution, and why.

V. The Idaho Constitutional Convention and Article XV.

In addition to the above, and because questions of constitutional interpretation are presented, this Court includes certain portions of the proceedings of the Constitutional Convention of Idaho to trace the crafting of section 3; the section in which Idaho's version of the doctrine of prior appropriation became firmly rooted in Idaho's Constitution.

According to I.W. Hart, the Editor and Annotator of the publication of the Proceedings and Debates of the Constitutional Convention of 1889, all of the proceedings of the Convention were reported stenographically, at the time, by a very competent reporter, whose notes were filed with the Secretary of the Territory of Idaho. Proceedings and Debates, Preface at iii.[9]

However, certain records of the Convention were not preserved, namely the works of the respective standing committees which drafted, and then in due course, reported the various constitutional articles out to the whole Convention. According to I.W. Hart, these reports of the various article committees were in printed form with numbered lines, which numbers are frequently referred to in the reported proceedings of the whole Convention. None of these printed forms were preserved, thus in a few instances causing some difficulty in determining the exact places where amendments were offered within the various sections as discussed in the final publication of the proceedings. Id., preface at iv-v.

The actual publications of the Proceedings and Debates of the Constitutional Convention of Idaho, 1889 were ultimately made under authority of the Act of March 10, 1911, enacted to

[9] For purposes of clarity, it is helpful to note that Volume I ends at page 1024, and Volume II begins at 1025.

complete the transcripts of the stenographer's notes. Id., preface at iii; see also, 1911 Idaho Session Laws 686.

The completed publication consists of two volumes edited in 1912 by I.W. Hart, Clerk of the Supreme Court of Idaho, and is entitled Proceedings and Debates of the Constitutional Convention of Idaho, 1889. Proceedings and Debates at title page.

The Convention to draft the Constitution for the State of Idaho was convened July 4, 1889, (day one) in Boise City, Idaho. Id. at 1.

The drafting of the constitutional article on water rights was first assigned to the standing committee on Manufactures, Agriculture and Irrigation, which standing committee submitted its work in the form of a report to the Committee of the Whole Convention, on July 18, 1889, the twelfth day of the Convention. Id. at 52, 68, 182, 201. The Committee relied heavily on the experiences and history of the surrounding states of Utah, Colorado, and California. Id. at 1120-21.

The Committee of the Whole (Convention) first took up Article XV – Water Rights – on July 26, 1889, the nineteenth day of the convention. Id. at 1058, 1115.

Of interest to this Court is the fact that Section 1 and Section 2 of Article XV were read, voted upon and initially adopted with no discussion from the Committee of the Whole. Id. at 1115.[10] Section 1 and 2 of Article XV read as follows:

SECTION 1

> The use of all waters now appropriated, or that may hereafter be appropriated for sale, rental or distribution; also of all water originally appropriated for private use, but which after such appropriation has heretofore been, or may hereafter be sold, rented, or distributed, is hereby declared to be a public use, and subject to the regulation and control of the state in the manner prescribed by law.

[10] However, Section 1 and its purpose were subsequently discussed as to whether "vested rights" could be taken. Id. at 1343-48.

Id. at 2079.

SECTION 2

> The right to collect rates or compensation for the use of water supplied to any county, city, or town, or water district, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of, and in the manner prescribed by law.

Id.

The section originally numbered Section 4, as reported out from the standing committee, was stricken/deleted in its entirety, and the remainder of the sections (then re-numbered, i.e. 5 became 4, 6 became 5, and 7 became 6) commanded relatively little discussion.[11] See id. at 1176-85.

However, Article XV, Section 3, which contains the prior appropriation doctrine and its parameters, was discussed and debated at length, over several different days[12], and is reported in at least the following locations in Volume II of the Proceedings and Debate of the Constitutional Convention of Idaho, 1889, pages:

1114-1148

1154-1176

1183

1185

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[11] The purpose of sections 1, 5, and 6 was debated and expressed several days later. Id. at 1352.

[12] 1. July 25, 1989, Thursday, was the eighteenth day of the convention and is reported at Volume I. pages 901 through 1024 and Volume II, pages 1025-1058.
2. July 26, 1889, Friday (an apparent typographical error lists this as Saturday on page 1088) was the nineteenth day, and is reported at Volume II, pages 1058-1188.
3. July 27, 1889, Saturday, was the twentieth day, reported at Volume II, pages 1188-1276.
4. July 29, 1889, Monday, was the twenty-first day, reported at Volume II, pages 1276-1407.
5. July 30, 1889, Tuesday, was the twenty-second day, reported at Volume II, beginning on page 1407.
6. August 6, 1889, the twenty-eighth day, was reported at Volume II, beginning on page 2029; the Constitution was signed, page 2041; and the Convention adjourned, *sine die*, at page 2046.

1237-1239

1331-1333

1340-1365

1407.

As noted earlier, the records and papers of the standing committees were not preserved. Id., preface at iv-v. However, by reading the debate as reported in the pages referenced immediately above, this Court has been able to reconstruct Section 3 of Article XV as it was initially reported out from the Standing Committee on Manufactures, Agriculture and Irrigation. When first presented to the Committee of the Whole, Section 3 read as follows:

> The right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Id. at 1117, 1140, 1141, and 1143.

On July 26, 1889, the first day Article XV was considered by the whole convention, an argument immediately ensued over the preferences contained in the proposed Section 3. It started like this:

> SECTION 3
>
> Section 3 was read, and it is moved and seconded that section 3 be adopted.
>
> Mr. SHOUP. Mr. Chairman, I don't exactly understand that section, and if the chairman of the committee is present I would like to have him explain it. **I understand by the reading of it that agriculture has the preference over mining.**

Mr. CHANEY. Over manufacturing.

Mr. SHOUP. If any person or company has been using this water for mining, and any person desires to use it for agriculture, they shall have the preference over those using it for mining?

The CHAIR. I don't know that the chairman of the committee is present. I **will say to the gentleman that I was on the committee, and the object of putting in that clause was, that where** water had been used for the three purposes from one ditch, and the **water ran short, the preference should be given first to domestic purposes**, household use, **and next to agricultural purposes, because if crops were in progress, being green, and the water was taken away for mining purposes, the crop would be entirely lost.** That is the reason why the committee saw fit to state it in that manner.

Id. at 1115 (emphasis mine).

Various amendments to the original version of section 3 were proposed and considered by the Committee of the Whole Convention.[13] These included a motion to strike the entire section, two proposed additions to the section which were ultimately approved, several proposed amendments that were ultimately rejected, plus an additional section was proposed but also rejected. However, and distilled to their essence, they were (again, not in the exact order proposed):

1. **Motion to strike all of Section 3 as originally drafted.**

This motion was offered by Mr. Beatty. Proceedings and Debates at 1116. This motion was withdrawn a short time later. Id. at 1122.

2. **Motion to strike "for the same purpose."**[14]

[13] The amendments, and more particularly the debate and discussion thereon, were not neatly confined and taken in order. As such, they are not stated here in the exact order presented in the debate.

[14] Following the adoption of the Motion to strike these four words, this "for the same purpose" language was again discussed by the whole Convention at various places. Including id. at 1331-33, 1358.

It was moved by Mr. Ainslie to strike the words "for the same purpose" from the second sentence of section 3 as originally reported. Id. at 1121-22. This would cause the proposed section to read like this:

> The right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water ~~for the same purpose~~; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

As to Mr. Ainslie's amendment to strike "for the same purpose," Mr. Poe attempted to defend the inclusion of this language, "for the same purpose" in Section 3 and argued the included language was necessary as follows:

> ***
>
> **What this law is intended to get at** is that the man who takes water for manufacturing purposes, and appropriates that water while it is running along there in his ditch, has the right to the use of it during the time it is passing through his ditch. The moment it leaves his ditch it becomes subject to relocation. Now, what I claim, Mr. Chairman is this: **that so long as that man uses that water for the purpose for which he took it out of its original bed**, to-wit: for the purpose of manufacturing, **he has the right to use that water for that purpose.** So, if he has taken it out for mining purposes he has the right to use it for that purpose; and if he has taken it out for irrigation purposes, he has the right to use it for that purpose; **but the moment** the manufacturer might conceive of a time when he could make the water more profitable for irrigating purposes than for manufacturing purposes, then he loses his priority right as a manufacturer, because **he undertakes to appropriate it for a purpose which he never intended when he took it, and his priority right does not come in**, and those men who have located along the line of that ditch then step in and say 'here, we are first entitled to the use of this for agricultural purposes.' We do not propose that we shall take the ditch away from him; the right to his work can never be forfeited; but the water was taken for a specific use, the use of manufacturing. He now undertakes to say that he has a priority right to use that water for another purpose; **but the law, and in my opinion is that this article, if it is adopted, will**

> **confine him to the use for which he originally took it;** and I am satisfied, Mr. Chairman, that if this article is adopted it will be of great benefit. **There is no use in talking about depriving a man of a vested right; you cannot do that, however much you may attempt it. The only attempt here made is this: that that man having taken water for manufacturing purposes, so long as he uses it for that purpose and that alone he has a priority right, but if he should attempt to appropriate it for another purpose, then his priority right would be gone.**

Id. at 1128-29, see also id. at 1139 (emphasis mine).

Mr. Ainslie then defended his motion to strike "for the same purpose" as follows:

> The CHAIR. **The question is upon the amendment** offered by the gentlemen from Boise **to strike out the words 'for the same purpose.'**
>
> Mr. AINSLIE. The gentleman from Cassia county, as I understand, says the supreme court of California refers to that matter. I never knew a decision in the supreme court of California or any other mining state or territory that refers to any such thing as that. All statements go to the proposition that priority of appropriation of water for any beneficial purpose whatever gives the best right. That principle is recognized by the supreme court of every mining state and territory of the United States. Now, sir, **the reason I want to strike out 'for the same purpose' is this: that there may be a conflict of the right to the water between** manufacturing and agricultural **purposes** and for mining purposes. **And I say that we are going to sustain the doctrine of he who is first in point of time is stronger than he who is best in right. That is the only correct doctrine that can be maintained.** If a person owns water for mining purposes, and only uses it for three or four hours of the day, *if he is not using that water*, anybody in God's world has the right to use it when he is not using it. Nobody contradicts that right, and that has nothing to do with striking out '**for the same purpose**;' but that **confines it to three of four purposes**. If a person takes water for mining purposes upon the same stream that is already appropriated, then the prior appropriator has priority over the subsequent appropriator for the same purpose. And if a person takes it out for mining purposes, and another person comes and takes it for mining or for agricultural purposes, subsequent to that time, **there is a conflict at once between those two parties, and if you strike out those four words, 'for the same purpose,' it places them all upon the same level with the qualifying words following.** 'But when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have preference over those claiming for any other purpose.' That does not conflict by striking those four words out; nor does it conflict by

> giving the agriculturist priority over the manufacturer. **But it recognizes to the fullest extent the priority of appropriation by any person who has taken the water; and that I believe is the true doctrine in these mining countries and all countries on the Pacific Coast. That is the reason I ask to have those four words struck out. It does not affect the matter at all, except the way it is there now it confines priority of appropriation between persons of the same class**: priority between men who have appropriated for mining purposes, and priority between men who have appropriated for agriculture, but does not give priority of appropriation by the miner any preference over priority of appropriation for manufacturing or agricultural purposes, and that is what I insist on, no matter what the rights are if the use is for beneficial purposes.

Proceedings and Debates at 1156-57 (italicized emphasis original, bold emphasis mine).

> ('Question, question.')
>
> The vote was taken upon the question of the amendment offered by Mr. Ainslie to strike out the words 'for the same purpose' in the third line.
>
> (Division demanded. On the rising vote, ayes 18, nays 11, and the amendment was carried.)

Id. at 1158.

3. **Motion to strike most of Section 3 as originally drafted.**

Judge Morgan moved to strike out all of Section 3 after the word "denied" in line 2, and insert "and those prior in time shall be superior in right." Id. at 1122. This would have caused the proposed Section 3 to read:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied and those prior in time shall be superior in right. ~~Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.~~

A part of the debate on this amendment went as follows:

SECRETARY reads: Strike out all of Section 3 after the word 'denied' in the second line, and insert, 'and those prior in time shall be superior in right.'

***

Mr. CLAGGETT. I would suggest to my colleague that that matter is passed upon already. The very sentence says: 'Priority of appropriation shall give the better right as between those using the water.' By striking out 'for the same purpose' it leaves it just the same.

('Question, question.')

The vote was taken on the adoption of the amendment. Lost.

Id. at 1158.

4. **Motion to strike out the preference for agricultural purposes over manufacturing purposes.**

Mr. Wilson proposed two amendments. The first Wilson Motion was to strike out all of Section 3 after the word "purpose" in line 7. Id. at 1118-19, 1121. Mr. Wilson's explanation is on pages 1118-19. This would have caused the proposed Section 3 to read:

> The right to appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as prescribed by law) have the preference over those claiming for any purpose~~; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes~~.

This motion was withdrawn, as stated in the next section. Id. at 1127.

5. **Motion to insert "power or motor."**

During the discussion of his proposed amendment to strike out the preference for agricultural purposes over manufacturing purposes stated immediately above, Mr. Wilson withdrew that Motion, and in its place, offered still another amendment. This amendment was to insert the words "power or motor" after the word "manufacturing" in line 8. Id. at 1126. The Wilson amendment would have caused Section 3 read like this:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing power or motor purposes.

The voting on this amendment went as follows:

> SECRETARY reads: Insert the words 'power or motor' after the words 'manufacturing' in line 8, section 3. (Vote.)
>
> A division was demanded. On the rising vote ayes 4, and the amendment was lost.

Proceedings and Debates at 1158.

6. **Motion to insert "riparian rights" related to irrigation.**

Following further debate, an amendment was offered by Mr. Vineyard. That amendment was:

> Mr. VINEYARD. I have sent to the clerk's desk an amendment which I desire to have read. I am in favor of this section [original version of Section 3 as it was reported out of committee] as it stands with the addition of that amendment.
>
> SECRETARY reads: Add in line 8 after the word 'purposes' the following: 'but no appropriations shall defeat the right to a reasonable use

of said water by a riparian owner of the land through which said water may run.'

Mr. VINEYARD. I want to add to my amendment after the word 'use' the following, 'for irrigation.'

Id. at 1131. Thus, Mr. Vineyard's proposed amendment would have caused Section 3 to read as follows:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority or appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes but no appropriations shall defeat the right to a reasonable use for irrigation of said water by a riparian owner of the land through which said water may run.

Mr. Vineyard defended his motion and a portion of the debate on Mr. Vineyard's riparian amendment went as follows:

> Mr. VINEYARD.
>
> ***
>
> **Now, there is an effort here to make every other right to the use of water secondary to its use for agricultural purposes, notwithstanding the time of its appropriation.** That is the effect of this amendment. Priority of right is governed by priority in time, except in instances here specified. **Now, if the doctrine of appropriation is to obtain in this territory absolutely, it will be for this convention to announce that doctrine as against the doctrine of the right of the riparian owner for the use of the waters for irrigation, which would be cut off here.**

Id. at 1131 (emphasis mine).

> Mr. VINEYARD. **But suppose the doctrine of appropriation obtains here. A man who gets a patent from the government to his land, although he has no appropriation, somebody has appropriated the**

water of that stream, either above or below, and claims another use of the stream; **what becomes of the rights of the owner of the land?**

Mr. POE. Let me ask you a question right there. Suppose that water had been appropriated by some party prior to the time that he located that land. Now, I will ask you if he does not have to take that land as he found it?

Mr. VINEYARD. **He takes under the act of congress of 1866; but no vested water rights.**

Mr. POE. **That water has been appropriated.**

Mr. VINEYARD. That is, for the purpose for which it had been appropriated, and no other purpose.

Mr. POE. **But he has no right to go and take that water out of that stream just because he does live along the stream, subject to that right.**

Id. at 1132 (emphasis mine).

Mr. VINEYARD.

***

Would he have the right to do it to the exclusion of the riparian owner along the banks through which the water ran, or **could that water be taken absolutely away? It could be if you engraft in the constitution here that the doctrine of appropriation shall have precedence to the doctrine of the common law upon the subject of riparian ownership.** That is the second effect of it.

Mr. AINSLIE. Will the gentleman allow me to ask him a question?

Mr. VINEYARD. With pleasure.

Mr. AINSLIE. If the waters of a stream are already appropriated and taken out, how could the man go to the head of that ditch, who never had any riparian rights or ownership?

Mr. VINEYARD. I am not talking about a ditch, Mr. Ainslie. I am taking about a natural channel, not about artificial ditches. I am talking about a stream like the Boise river where it flows through his ranch or farm. **Can a man by prior appropriation exclude the riparian owner of the land through which that stream runs from a reasonable use of the water**

for irrigation? I say no, unless you overturn the common law. That is all there is to it. **I want that added by this amendment.**

Id. at 1133 (emphasis mine).

Mr. Vineyard's riparian amendment was not well received as illustrated by some of the following comments:

> Mr. ALLEN.
>
> ***
>
> For if we take the proposition of the gentleman who has just taken his seat (Mr. VINEYARD) we throw aside all the experience of California, Utah and Colorado and go back to the primitive age when riparian doctrine was first established.

Id. at 1134.

> Mr. McCONNELL
>
> ***
>
> **Now, in regard to this riparian right business**, I had my attention called to a question since I have been here, on that subject; and as I told the gentlemen of the committee, **that was very largely what was the occasion of calling of the late constitutional convention in California. They found that under those claims of riparian right large capitalists were crushing out the poor settlers, and there was a clamor for a constitutional convention that this thing might be regulated**, so as to give every many an equal show. I believe I had the first irrigating ditch that was ever taken out of the waters for this or Boise county for irrigating purposes, and under the plea of riparian rights today one of the finest farms in Boise county is left a desert after the crop was planted and grown. **Parties came in above, and under the claim of riparian rights, diverted the water, and the man who has been cultivating the land and using that water for twenty-six years is today deprived of it and is compelled to go into the courts, and probably spend as much in litigating for what should be his vested rights, what every man would admit are his vested rights, as the farm is worth**...

Id. at 1137 (emphasis mine).

Further debate and voting on this amendment continued as follows:

Mr. CLAGGETT. That same doctrine of priority protects the riparian owner, provided he takes up his land first; and as said by the gentleman from Ada, if all the water is taken out and applied upon their land then when a man comes and takes up the land and finds that the water is all gone, he takes the land subject to the other man's rights.

Mr. GRAY. He takes it as he finds it.

Mr. CLAGGETT. Certainly.

The CHAIR. The question is on the amendment offered by the gentleman from Alturas. (Vote and lost).

Proceedings and Debates at 1161 (Emphasis mine).

7. **Motion to insert "Compensation for taking by subsequent appropriator."**

Mr. Ainslie then offered the following amendment, his second, to Section 3:

SECRETARY reads: Continue Section 3 as follows: 'but the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use as referred to in Section 14 of Article 1 of this Constitution. [Sic]

Id. at 1145. Mr. Ainslie's two proposed amendments to Section 3 would now make the section read:

The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water ~~for the same purpose~~; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes, but the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use as referred to in Section 14 of Article 1 of this constitution.

The discussion on this amendment went in part as follows:

Mr. AINSLIE. I will explain that, Mr. Chairman, that in the Bill of Rights the other day in regard to private property and prior appropriation of

water, is inserted private property for public as well as private uses, but private use is denominated as public use in Article 14. The article was amended so that I have not got the fully text of it.

If we recognize the principle of priority of rights, which is practically the law, and not only the law, but common sense also, and ***if we can by this provision of the irrigation law provide that persons may have prior right to the use of water for agricultural purposes, notwithstanding the prior appropriation by persons who want the same for manufacturing purposes***, if the manufacturer has the prior right ***he ought to receive compensation for the use of his water*** **by agriculturalists** under Article 14 of the Bill of Rights. ***And that would go to the question of taking private property and giving it to another without giving anything for it. By protecting the prior appropriator and recognizing his right, he would be entitled to compensation if he was shut down in order to allow the agriculturists to cultivate their farms.*** **Let them pay the manufacturer for the use of the water.**

Id. at 1145-46 (both bold and italicized emphasis mine). Then, the final debate on this provision went as follows:

Mr. AINSLIE. I would like to have the committee on Irrigation and Mining accept that amendment.

Mr. ALLEN. That chairman is not present, but for one, so far as the idea corresponds with that in the Bill of Rights, I think there would be no objections.

Mr. AINSLIE. **That would secure all their constitutional rights**, and I move the adoption of it.

Mr. GRAY. Wouldn't it be proper to be in the next section?

Mr. CLAGGETT. So far as that matter is concerned, I think that whole subject is covered by sections 5 and 6, so far as it ought to be covered. **I don't believe there should be absolute priority in irrigation by any claimants, but let that right be limited as it is here, and in the other sections, so that when the first man comes in and takes up the water he is not going to be allowed to play the dog-in-the-manger policy.** There may in ordinary years enough water to supply all of the people that settle along a ditch or canal, which is being distributed, but **when there comes a dry season, is one-half of the farms to be absolutely destroyed because the other man has an absolute priority, or is there to be an equitable distribution under such rules and regulations as may be provided in law?** Sections 5 and 6 deal specifically with that question.

Mr. GRAY. I say, Mr. Chairman, that the man first in time is first in right. **If he were there first, and the water is short, it is his. If there is more than he wants, he shall not be allowed to play the dog-in-the-manger policy.** That is, if he does not need the water, as a matter of course, the general law will keep him from doing that; but if he was there first, he shall be first served, and when he has supplied his needs, then his neighbors below him can be supplied, and so on down.

Mr. AINSLIE. **I have read these sections carefully, and it is not provided for in any other section; but if you contemplate making the agricultural interests of the territory superior to the manufacturing interests, as proposed in the section as it stands, without this amendment,** then any person, who has appropriated water for manufacturing purposes alone, and is using it for that, and during a dry season the water becomes scarce, the farmers below the line of that ditch, if they have build another ditch appropriating those same waters, **could deprive the manufacturer of his prior right to that water, deprive him of a prior appropriation without compensation.** I go this far in a conservative way, and say while we may give them a prior right to use the water if there is not enough for the agriculturist and the manufacturer both, **give the agriculturist a prior right to the use of the water, but include in section 14 of your Bill of Rights that he shall pay the manufacturer for its use.**

('Question, question.')

Vote on the question of the amendment offered by the gentleman from Boise. Division. On the rising vote, ayes 13, nays 12. And the amendment was adopted.

Id. at 1161-63 (emphasis mine).

8. **Motion to establish preferences "in any organized mining district."**

Mr. Heyburn offered an amendment to Section 3 relating to mines. It provided:

SECRETARY reads: Amend section 3 by adding after the last word 'in any organized mining district those using the water for mining purposes or for milling purposes connected with mining shall have preference over those using the same for manufacturing or agricultural purposes.'

Id. at 1148. This amendment would make Section 3, as originally reported out of the standing committee, read as follows:

> The right to appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. In any organized mining district those using the water for mining purposes or for milling purposes connected with mining shall have preference over those using the same for manufacturing or agricultural purposes.

The voting on this amendment went as follows:

> The CHAIR. The question is on the amendment offered by the gentlemen from Shoshone.
>
> Mr. STANDROD. I would like to have the amendment read.
>
> SECRETARY reads Mr. Heyburn's amendment.
>
> ('Question, question.')
>
> Rising vote taken; ayes 21, nays 6; and the amendment was adopted.

Proceedings and Debates at 1166.

9. **Finally, an additional [or new] section was proposed.**

> ADDITIONAL SECTION PROPOSED [to apply within an organized mining district]
>
> Mr. HEYBURN. Mr. Chairman, I desire to propose, following that, a new section.
>
> SECRETARY reads: 'Where land has been located along or covering any natural stream for any purpose, which contemplates the use of the water of such stream, then no person shall be permitted to take the water from said

stream at a point above the land so located to the exclusion of such locator after such location.'

***

Mr. HEYBURN. It should follow the mining section because it is intended to apply to this.

Id. at 1166.

Mr. CLAGGETT. I do. I see a multitude of points that do not lie in the bill, they lie on the outside. **We have sacrificed the doctrine of riparian ownership to the doctrine of appropriation for agricultural purposes.**

***

We have done that by the consent of the entire convention. Now what does my friend want? He wants to reserve and preserve the doctrine of riparian ownership as to mining claims, ... and when somebody has come along and taken the water to some beneficial use in the matter of mining, then by reason of the right of riparian ownership this original claim owner can demand that that water be turned on to him at any time. Now, I say that the doctrine of priority appropriation should govern in all particulars which are absolutely necessary and which we have provided for here.

Id. at 1169 (emphasis mine).

('Question, question.')

The vote was taken on Mr. Heyburn's proposed section and the motion was lost.

Id. at 1176.

10. **Section 3 adopted as amended.**

Mr. CLAGGETT. I move the adoption of Section 3 as amended (Seconded. Vote and carried).

Id. at 1176; see also id. at 1183.

Following the above actions by the Convention, Article 3 then read:

> Sec. 3. The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring to use of the same, those using the water for domestic purposes shall, (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose. And those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district, those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public [use] and private use, as referred to in Section 14 of Article I of this Constitution.

On July 26, the nineteenth day of the Convention, the entire Article XV, including the above version of Section 3, was then voted upon and adopted. Proceedings and Debates at 1183-85.

On July 27, 1889, "Article XV – Agriculture and Irrigation" was presented to the whole Convention for its final reading and its adoption was moved. Id. at 1237. At this point, further debate was sought, but a vote was taken instead, and Article XV was adopted and sent to the Committee on Revision to become one of the articles in the Constitution. Id. at 1237-39.

11. **Renewed Motion to grant preference for domestic use only.**

However, the debate on Section 3 of Article XV was far from being over. On July 29, the twenty-first day of the Convention, it was again moved to amend the then existing Section 3 by:

1. eliminating all use preferences except for domestic use; and
2. to strike or eliminate the "compensation for taking by a subsequent appropriator" provision and the "organized mining district" provision which had been added/adopted three (3) days earlier on July 26.

Id. at 1330-34.

The proposed amendment of July 29 was for Section 3 to read as follows:

> The CHAIR. The secretary will now read the substitute proposed by the gentleman from Shoshone.
>
> SECRETARY reads: 'The right to divert and appropriate the unappropriated waters of any natural stream to beneficial use shall never be denied. Priority of appropriation shall give the better rights as between those using the water, but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall, subject to such limitations as may be prescribed by law, have preference over those claiming for any other purpose.'

Id. at 1340-41.

After significant and spirited debate spread over some additional thirty-four (34) pages of the reported proceedings (pages 1330-1364), the renewed motion to amend Section 3 raised on July 29 failed. Section 3 remained as it was previously adopted on July 26, 1889, and as ultimately reported in the original Constitution. Id. at 1364, 1365, 2079, 2080.

12. **Summary**

In an effort to summarize the relevant parts of the debate relating to Section 3, as it relates to the issues in the present suit, the concerns fell into three fairly distinct categories.

First were the policy reasons for establishing the express preferences in times of scarcity between the competing uses of domestic, agriculture, and manufacturing (including water used for power generation to operate plants and mills) in Idaho's version of the prior appropriation doctrine, with a primary one being the recognition of the need for timely administration to protect growing crops.

The second was, having resolved that in times of scarcity some preference for the purpose of water use should be placed in the Constitution, how to protect the senior vested property rights created by the prior appropriation doctrine; i.e. compensation for any taking by a preferred use.

Third was whether any riparian rights should be established. The issue was brought up twice, once relative to agriculture, and once relating to mining. Notions of riparian or "equal" standing were strongly rejected each time.

VI. Article XV, §§ 4 and 5.

Sections 4 and 5 were adopted as follows:

SECTION 4

> Whenever any waters have been, or shall be appropriated, or used, for agricultural purposes, under a sale, rental, or distribution thereof, such sale, rental, or distribution shall be deemed an exclusive dedication to such use; and whenever such waters, so dedicated, shall have once been sold, rented or distributed to any person who has settled upon, or improved land for agricultural purposes, with the view of receiving the benefit of such water under such dedication, such person, his heirs, executors, administrators, successors, or assigns shall not thereafter without his consent, be deprived of the annual use of the same, when needed for domestic purposes, or to irrigate the land so settled upon or improved, upon payment therefor, and compliance with such equitable terms and conditions as to the quantity used and times of use, as may be prescribed by law.

Proceedings and Debates at 2080.

SECTION 5

> Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article, provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be

> sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used, and times of use, as the legislature, having due regard, both to such priority of right, and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.

Id.

The adoption and the intent of the framers with respect to what are now sections 4 and 5 of the Constitution are most easily expressed by simply quoting from the Idaho Supreme Court.

In Mellen v. Great Western Belt Sugar Co., 21 Idaho 353, 122 P. 30 (Idaho 1913), the Idaho Supreme Court discussed the meaning of Sections 4 and 5 as follows:

> **The framers of our constitution evidently meant to distinguish settlers who procure a water right under a sale, rental or distribution from that class of water users who procure their water right by appropriation and diversion directly from the natural stream. The constitutional convention accordingly inserted secs. 4 and 5, in art. 15, of the constitution, for the purpose of defining the duties of ditch and canal owners who appropriate water for agricultural purposes** to be used 'under a sale, rental or distribution' and to point out the respective rights and priorities of the users of such waters. **It was clearly intended that whenever water is once appropriated by any person or corporation for use in agricultural purposes under a sale, rental or distribution, that it shall never be diverted from that use and purpose so long as there may be any demand for the water and to the extent of such demand for agricultural purposes.** And so sec. 4 is dealing chiefly **with the ditch or canal owner, while sec. 5 is dealing chiefly with the subject of priorities as between water users and consumers who have settled under these ditches and canals and who expect to receive the water under a 'sale, rental or distribution thereof.' The two sections must therefore be read and construed together.**
>
> It is plain that the framers of the constitution in the adoption of sec. 5 meant to date the priorities of claimants from the time of 'settlement or improvement.' That is to say, that one who improves his land with a view to receiving water for the irrigation thereof and who proceeds with diligence and in good faith to put his land in condition for irrigation, is entitled to have his priority date from the time he commenced to make such improvement. So, also, one who actually settles upon such land and proceeds with diligence and in good faith to prepare his land for irrigation is entitled to have his priority date from the time of such settlement. One who purchases a water right for his land from such canal or ditch company

is placed upon exactly the same footing as any other user of water under that canal system. His priority cannot date from the time of his purchase of such water right, but must date from the time he either settles upon the land or from the time he begins to improve the land for irrigation.

So it will be seen that the purchaser of a water right from a canal company is in no better condition than he would have been had he not purchased such a right, for the reason that he still is obliged to either settle upon or improve the land the same as one who has never purchased a water right.

The effect of these two sections of the constitution was discussed somewhat by the members of the constitutional convention. Mr. Gray and Mr. Hampton both protested that they did not understand the purpose of the committee in drafting sections 4 and 5, and that they did not understand the meaning intended to be conveyed thereby. **The president of the convention, Mr. Claggett, on the other hand, seemed to have a very clear understanding of the provisions and was the only one who spoke in favor of their adoption, and his discussion and explanation seems to have been accepted by the majority of the convention as they voted down the amendments presented by Gray, Hampton and Poe, and adopted the provisions as they now stand. We quote the following** as a part of the debate and proceeding had in this connection:

> Mr. Claggett: I will state to the committee that he heart of this bill lies in sections 4 and 5 as a practical measure. This portion of section 4 amounts to this: that whenever these canal owners – if the gentleman will see, 'for agricultural purposes under a sale, rental or distribution thereof,' – whenever one of these large canals is taken out for the purpose of selling, renting or distributing water, or the appropriation is made hereafter for that purpose, and that after that has once been done, inasmuch as priorities will immediately spring up along the line of that canal, even before the canal is located; for instance, if a company should start in here to take a large quantity of water out to supply a given section of country, and should appropriate or give notice to the world that they were appropriating it for agricultural purposes 'under a sale, rental or distribution thereof,' then immediately, just as soon as the ditch was surveyed, people would come in and begin to locate farms and improve them right along the line of that ditch; and therefore it is necessary in order to protect them, inasmuch as they have spent this money in settling there under a promise, which was made by the company, that the water should be used for agricultural purposes, that the water should not be allowed to be diverted from that purpose and